Supreme Court, U.S.
FILED
APR 21 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1210

In the Supreme Court of the United States

OCTOBER TERM, 1986

HARLLEL B. JONES, PETITIONER

v.

ROBERT SHANKLAND, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

CHARLES FRIED
Solicitor General
RICHARD K. WILLARD
Assistant Attorney General
BARBARA L. HERWIG
Attorney
Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTIONS PRESENTED

1. Whether the court of appeals erred in determining which of two Ohio statutes of limitations governing personal injury actions is to be applied to Ohio-based actions brought pursuant to 42 U.S.C. 1983.

2. Whether the court of appeals erred in determining when the statute of limitations began to run on petitioner's claims.

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Statutory provisions involved	1
Statement	2
Argument	5
Conclusion	11

TABLE OF AUTHORITIES

Cases:

Banks v. *Chesapeake & Potomac Telephone Co.*, 802 F.2d 1416 (D.C. 1986) 6, 7

Bivens v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971) 3

Board of Regents v. *Tomanio*, 446 U.S. 478 (1980) 8, 10

Carroll v. *Wilkerson*, 782 F.2d 44 (6th Cir. 1986), cert. denied *sub nom, County of Wayne* v. *Carroll*, No. 86-158 (Oct. 20, 1986) 6

Farmer v. *Cook*, 782 F.2d 780 (8th Cir. 1986) 6

Gates v. *Spinks*, 771 F.2d 916 (5th Cir.), cert. denied, No. 85-1215 (Mar. 10, 1986) 6, 7

Hamilton v. *City of Overland Park*, 730 F.2d 613 (10th Cir. 1984), cert. denied, 471 U.S. 1052 (1985) 6

Jago v. *U.S. District Court*, 570 F.2d 618 (6th Cir, 1978) . 2

Johnson v. *Railway Express Agency, Inc.*, 421 U.S. 454 (1975) 8

Jones v. *Jago*, 428 F. Supp. 405 (N.D. Ohio 1977), aff'd, 575 F.2d 1164 (6th Cir.), cert. denied, 439 U.S. 883 (1978) 2

Jones v. *Preuit & Mauldin*, 763 F.2d 1250 (11th Cir. 1985), cert. denied, No. 85-794 (Jan. 27, 1986) 6, 8

McKay v. *Hammock*, 730 F.2d 1367 (10th Cir. 1984) 6

Mismash v. *Murray City*, 730 F.2d 1366 (10th Cir. 1984), cert. denied, 471 U.S. 1052 (1985) 6

Mulligan v. *Hazard*, 777 F.2d 340 (6th Cir. 1986), cert. denied, No. 85-1641 (June 9, 1986) 3, 4, 6, 7

Robertson v. *Wegmann*, 436 U.S. 584 (1978) 8

Cases—Continued: Page

Small v. *Inhabitants of Belfast*, 796 F.2d 544 (1st Cir. 1986) 6, 7
Villante v. *Department of Corrections*, 786 F.2d 516 (2d Cir. 1986) 6
Wilson v. *Garcia*, 471 U.S. 261 (1985) 3, 4, 5, 6, 7, 8

Statutes and rule:

42 U.S.C. 1983 .....3, 5, 8, 9, 10
42 U.S.C. 1985 3
42 U.S.C. 1986 3
Ala. Code (1977):
§ 6-2-34(1) 8
§ 6-2-39(a)(5) 8
D.C. Code Ann. (1981):
§ 1-2544 7
§ 12-301(4) 7
§ 12-301(8) 7
Me. Rev. Stat. Ann. tit. 14 (1980):
§ 752 7
§ 753 7
Miss. Code Ann. (1972):
§ 15-1-35 7
§ 15-1-49 8
Ohio Rev. Code Ann. (Anderson 1981 & Supp. 1985):
§ 2305.9 1
§ 2305.10 (& Supp. 1985) 1
§ 2305.11 (& Supp. 1985) 3, 4, 5
§ 2305.16 5
Sup. Ct. R. 29.1 1

In the Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-1210

HARLLEL B. JONES, PETITIONER

v.

ROBERT SHANKLAND, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A3-A26) is reported at 800 F.2d 77.

JURISDICTION

The judgment of the court of appeals was entered on September 2, 1986, and rehearing was denied on October 20, 1986 (Pet. App. A1-A2). The petition for a writ of certiorari was filed on January 20, 1987.[1] The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Ohio Rev. Code Ann. §§ 2305.09, 2305.10, 2305.11, and 2305.16 (Anderson 1981 & Supp. 1985) are reproduced at Pet. 2-4.

[1] Monday, January 19, 1987, was a federal legal holiday. See Rule 29.1 of the Rules of this Court.

STATEMENT

On March 28, 1972, petitioner was convicted in the Court of Common Pleas of Cuyahoga County, Ohio, of second degree murder and shooting with intent to kill or wound, and received concurrent sentences of life imprisonment and one to twenty years' imprisonment. See, *Jones* v. *Jago*, 428 F. Supp. 405, 406 (N.D. Ohio 1977), aff'd, 575 F.2d 1164 (6th Cir.), cert. denied, 439 U.S. 883 (1978).

Thereafter, on February 10, 1977, the United States District Court for the Northern District of Ohio granted petitioner a writ of habeas corpus, which provided for petitioner's release should the State not initiate new trial proceedings against him within 90 days of the order. 428 F. Supp. at 411. Because no new proceedings were initiated, petitioner was released from custody, on bail, on June 24, 1977. See *Jago* v. *U.S. District Court*, 570 F.2d 618, 619 n.1 (6th Cir. 1978).[2] The district court's grant of habeas relief to petitioner was affirmed by the Sixth Circuit on May 3, 1978 (see 575 F.2d 1164) and the State's petition for a writ of certiorari was denied on October 2, 1978. 439 U.S. 883.[3] On February 12, 1979, the district court declared petitioner unconditionally released, thus setting aside the requirement of bail (Pet. App. A6).

On October 29, 1979, petitioner initiated the instant action against, inter alia, William M. Greene, Jr., and William Kelly, Special Agents of the Federal Bureau of Investigation, who were sued in their personal capacities.[4]

---

[2] In *Jago* v. *U.S. District Court, supra,* the state unsuccessfully petitioned the Sixth Circuit to compel the withdrawal of the grant of bail to petitioner by the district court.

[3] On October 16, 1978, Justice Stewart denied the state's application for suspension of the Court's denial of certiorari (Pet. App. A25).

[4] In addition, petitioner sued three Cleveland police officers, several county prosecutors, and Cuyahoga County.

Petitioner's complaint alleged violations of various constitutional rights, claims arising under 42 U.S.C. 1983, 1985, and 1986, and pendent claims under state law for false imprisonment, malicious prosecution, abuse of process, and defamation.

Upon defendants' motion, the district court dismissed the complaint in its entirety, ruling, inter alia, that petitioner had failed to initiate his action within the period required by the applicable Ohio statute of limitations (Ohio Rev. Code Ann. § 2305.11 (Anderson 1981 & Supp. 1985).[5]

In affirming the district court, the court of appeals first found that petitioner's claims were subject to this Court's "determination in *Wilson* v. *Garcia* [471 U.S. 261] (1985), that actions under section 1983 are best characterized as personal injury actions and subject to the state statutes of limitations for those types of claims" (Pet. App. A13).[6] The court observed that the issue of which Ohio statute of limitations was to be applied under *Wilson* v. *Garcia*, 471 U.S. 261 (1985), had been settled in *Mulligan* v. *Hazard*, 777 F.2d 340 (6th Cir. 1985), cert. denied, No. 85-1641 (June 9, 1986), and, accordingly, the panel was constrained

---

[5] The district court also ruled that, while the county defendants had waived the statute of limitations defense by failing properly to raise it, they were absolutely immune from liability for their conduct in prosecuting the criminal case against petitioner. The court of appeals affirmed the district court's determination of absolute immunity (Pet. App. A11-A12), and petitioner has not challenged its affirmance.

[6] While petitioner's complaint alleges injuries under 42 U.S.C. 1983, 1985, and 1986, and arguably personal claims against federal respondents for constitutional torts, as in *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), neither the district court nor the court of appeals distinguished among the various claims for statute of limitations purposes. Accordingly, both courts below tested all of petitioner's claims under the statute of limitations principles established by this Court for Section 1983 claims. Petitioner has not challenged this aspect of the decision of the court of appeals.

by the law of the circuit as stare decisis (Pet. App. A13). Therefore, the court of appeals affirmed the district court's application of Ohio Rev. Code. Ann. § 2305.11 (Anderson 1981 & Supp. 1985), which provides that "[a]n action for libel, slander, assault, battery, malicious prosecution [or] false imprisonment * * * shall be brought within one year after the cause of action accrued * * *."[7]

The court of appeals next determined that the time for petitioner to initiate his action began to run no later than October 16, 1978,[8] rejecting petitioner's argument that "[t]he district court's order of February 12, 1979, in final conclusion of the habeas proceedings" (Pet. App. A25) should be the event which began the statute of limitations running. The court of appeals found that the February 12 order "was nothing more than an administrative act of closing the file," concluding (Pet. App. A25-A26):

> The result had already been fully and totally adjudicated. We see no reason to string out the time for the statute to run by conceiving of every possible method by which the ultimate result in the habeas case might have been forestalled.

---

[7] In *Mulligan* the Sixth Circuit had determined that Section 2305.11 "more specifically encompasses the sorts of actions which concerned Congress as it enacted the civil rights statutes" (777 F.2d at 344).

The court of appeals also followed *Mulligan* in holding that *Wilson* v. *Garcia, supra*, was to be applied retroactively (Pet. App. A14). Petitioner has not sought review of this holding.

[8] The court of appeals observed (Pet. App. A24-A25):

> As noted by the district court, the Supreme Court denied certiorari on October 2, 1978; on October 16, 1978, Justice Stewart refused to suspend the denial of the application for writ of certiorari. Without necessarily holding that the one year period should be calculated as running from either of those dates in contrast to some earlier date, it is sufficient to say that under any reasonable construction of finality, [petitioner] had had well over a year in which to act before commencing the district court suit on October 29, 1979.

Finally, the court of appeals found that Ohio's tolling statute was applicable "to the extent [it is] not inconsistent with federal policy underlying section 1983" (Pet. App. A15). Absent any such inconsistency, the court of appeals held that Ohio Rev. Code Ann. § 2305.16 (Anderson 1981), which tolls the time for bringing actions under, inter alia, Ohio Rev. Code Ann. § 2305.11 (Anderson 1981 & Supp. 1985), "if a person * * * is, at the time the cause of action accrues, * * * imprisoned [until] after such disability is removed," does not contemplate tolling during time spent out of prison on bail (Pet. App. A16).

Accordingly, the court of appeals affirmed dismissal of petitioner's complaint on statute of limitations grounds, holding that Ohio's one-year statute of limitations for personal injury applied, and that the time for petitioner to bring this action had begun to run no later than this Court's denial of the State's petition for certiorari challenging the writ of habeas corpus—more than one year before petitioner initiated this action.

ARGUMENT

Petitioner contends that further review of this case is warranted because the court of appeals incorrectly applied the principles of *Wilson* v. *Garcia* when selecting the statute of limitations governing the timeliness of petitioner's complaint, and because the court of appeals incorrectly determined the latest date at which the statute of limitations began to run on petitioner's claims. The decision of the court of appeals was correct on each issue, however, and there is no conflict with any decision of this Court or of any other court of appeals meriting resolution by this Court. Accordingly, further review is not warranted.

1. In *Wilson* v. *Garcia* this Court held that one statute of limitations should be applied for all Section 1983 actions in a state (471 U.S. at 275), and that Section 1983 ac-

tions are to be characterized "as involving claims for personal injuries" (471 U.S. at 279). Petitioner does not claim that these principles have not been followed by the court of appeals herein; he claims only that its choice between Ohio's two statutes governing the time in which "claims for personal injuries" must be raised, is in conflict with the decisions of other circuits. No conflict necessitating review exists, however.[9]

The petitioner cites various decisions in which other courts of appeals have selected, as did the court of appeals herein, one of two state statutes of limitations meeting *Wilson*'s requirement that the statute chosen govern actions characterized "as involving claims for personal injuries" (471 U.S. at 279).[10] In addition, petitioner claims a conflict exists within the Sixth Circuit itself between *Mulligan* v. *Hazard, supra*, and *Carroll* v. *Wilkerson*, 782 F.2d 44 (1986), cert. denied *sub nom. County of Wayne* v. *Carroll*, No. 86-158 (Oct. 20, 1986).[11]

---

[9] Significantly, the court below simply followed its previous decision in *Mulligan*, which settled for the circuit the precise question as to Ohio law raised in this case; certiorari was denied in *Mulligan* on this issue (No. 85-1641) (June 9, 1986)). There is no reason for any different result here.

[10] See Pet. 10-13, citing *Banks* v. *Chesapeake & Potomac Telephone Co.*, 802 F.2d 1416 (D.C. Cir. 1986); *Small* v. *Inhabitants of Belfast*, 796 F.2d 544 (1st Cir. 1986); *Villante* v. *Department of Corrections*, 786 F.2d 516 (2d Cir. 1986); *Farmer* v. *Cook*, 782 F.2d 780 (8th Cir. 1986); *Mismash* v. *Murray City*, 730 F.2d 1366 (10th Cir. 1984) (en banc), cert. denied, 471 U.S. 1052 (1985); *Hamilton* v. *City of Overland Park*, 730 F.2d 613 (10th Cir. 1984) (en banc), cert. denied, 471 U.S. 1052 (1985); *McKay* v. *Hammock*, 730 F.2d 1367 (10th Cir. 1984) (en banc); *Gates* v. *Spinks*, 771 F.2d 916 (5th Cir.), cert. denied, No. 85-1215 (Mar. 10, 1986); *Jones* v. *Preuit & Mauldin*, 763 F.2d 1250 (11th Cir. 1985), cert. denied, No. 85-794 (Jan. 27, 1986).

[11] In *Carroll* the Sixth Circuit had to choose between two Michigan statutes arguably governing claims for personal injuries. See *County of Wayne* v. *Carroll, supra* (Justice White, dissenting).

That the courts of appeals have applied seemingly dissimilar statutes of limitations does not, however, indicate that there exists the kind of conflict among the circuits which warrants review. Rather, it reflects the inescapable fact that among the more than fifty jurisdictions, in each of which *one* statute of limitations governing claims for personal injuries must be chosen, there exists a wide variety of such statutes from which to choose. Indeed, given that wide variety—the various statutes created by the states are more appropriately described by their differences than their similarities—it would seem impractical to attempt to fashion a rule more precise than the direction already established by this Court in *Wilson*.[12]

---

[12] *Mulligan* v. *Hazard, supra*, demonstrates this point. Petitioner's asserted conflict among the circuits is based on the theory that the court's choice is simply between statutes governing intentional torts and those governing non-intentional torts (Pet. 15). However, as the court of appeals noted in *Mulligan*, "both [statutes] theoretically encompass intentional tort actions" (777 F.2d at 344). The fact of the matter is that the states have differentiated their statutes on the basis of various distinctions. Thus, the kind of uniformity petitioner seeks would be entirely artificial and, moreover, might not even be possible without doing serious damage to the meaning of several state statutes of limitations through the use of an entirely unnecessary Procrustean device. The cases petitioner cites (Pet. 10-13) themselves are illustrative. See, *e.g.*, *Banks* v. *Chesapeake & Potomac Telephone Co.*, 802 F.2d at 1426 (choosing between D.C. Code Ann. § 12-301(4) (1981))—applicable to actions for libel, slander, assault, battery, mayhem, wounding, malicious prosecution, false arrest or false imprisonment—§ 12-301(8)—applicable to all other claims for personal injuries—and § 1-2544—the statute of limitations in the D.C. Human Rights Act); *Small* v. *Inhabitants of Belfast*, 796 F.2d at 545-546 (choosing between Me. Rev. Stat. Ann. tit. 14, § 753 (1980))—applicable to defamation, assault and battery, false imprisonment and medical malpractice—and Me. Rev. Stat. Ann. tit. 14, § 752 (1980), applicable to all other personal injury claims except those instituted against certain professionals); *Gates* v. *Spinks*, 771 F.2d at 919 (choosing between Miss. Code Ann. § 15-1-35 (1972))—applicable to actions for assault, assault and battery, maim-

Moreover, to ignore the differences among the state statutes would violate this Court's express direction in *Wilson* that, in borrowing the most appropriate state statute of limitations, the "federal law incorporates the State's judgment on the proper balance between the policies of repose and the substantive policies of enforcement" (471 U.S. at 271). Indeed, the wide variety in state legislation available to govern Section 1983 claims has been repeatedly noted by this Court:

> The need for uniformity, while paramount under some federal statutory schemes, has not been held to warrant the displacement of state statutes of limitations for civil rights actions.

Boards of Regents v. *Tomanio*, 446 U.S. 478, 489 (1980), citing *Johnson* v. *Railway Express Agency, Inc.*, 421 U.S. 454 (1975).[13]

Thus, this Court has not contemplated that the choices among state statutes will lead to uniform results—except that in any one state, only one statute of limitations may govern Section 1983 actions. The seemingly differing

---

ing, false imprisonment, malicious arrest, menace, and all actions for slanderous words or libel—and Miss. Code Ann. § 15-1-49 (1972)—applicable to all actions not otherwise provided for, including many actions not based on tort); *Jones* v. *Preuit & Mauldin*, 763 F.2d at 1253-1254 (choosing between Ala. Code § 6-2-34(1) (1977))—applicable to actions "for any trespass to person or liberty, such as false imprisonment or assault and battery"—and Ala. Code § 6-2-39(a)(5) (1977)—applicable to actions for "any injury to the person or rights of another not arising from contract and not specifically enumerated").

[13] See also *Robertson* v. *Wegmann*, 436 U.S. 584, 594 n.11 (1978):

> [W]hatever the value of nationwide uniformity in areas of civil rights enforcement where Congress has not spoken, in the areas to which § 1988 is applicable Congress has provided direction, indicating that state law will often provide the content of the federal remedial rule. This statutory reliance on state law obviously means that there will not be nationwide uniformity on these issues.

choices as *between* the states are products of the vast differences in the options which have been presented by the various state statutes; these choices must necessarily be made on a state-by-state basis. The varied choices, therefore, do not present the kind of conflict among the circuits this Court needs to resolve, but rather result from the multi-state federalism created by the Constitution.

2. Petitioner offers two theories in support of his contention that the Court should review further the determination of when the statute of limitations began to run on petitioner's claims. First, he argues that the time should not begin to run until after the State could no longer seek relief in district court from the habeas corpus judgment (Pet. 22). Second, he contends that a federal equitable tolling principle should be fashioned to replace the state tolling statute used below (Pet. 29-31).[14] Neither of these arguments, however, supports further review of the question of when petitioner's time began to run.

---

[14] Petitioner suggests that the court of appeals "assum[ed] without deciding that a federal equitable rule applied * * * ([Pet. App.] A24-25)" (Pet. 26) and "rul[ed] that Petitioner's § 1983 action was untimely, even if a federal tolling principle applied" (Pet. 30). This suggestion appears to be disingenuous, at best. The citation in the petition purportedly supporting it—"A24-25"—refers to the conclusion of the court of appeals that "under any reasonable construction of finality, [petitioner] had had well over a year in which to act before commencing the district court suit" (Pet. App. A25). This concludes the court's discussion of whether "abstention pending the resolution of state proceedings was appropriate" when a Section 1983 suit has been brought and a state proceeding giving rise to the federal claim is still pending. See, Pet. App. A17-A24. The court of appeals concluded (Pet. App. A24):

> We need not, however, decide here whether a dismissal without prejudice or the retention while abstaining from action is preferable for we determine that in all events the habeas corpus case had been fully concluded more than one year before the suit was started.

Refusing to decide an irrelevant abstention issue clearly does not propound a federal equitable tolling principle.

First, petitioner nowhere suggests that a conflict with any decision of any appellate court has been created by the court of appeals' decision on this issue. Indeed, petitioner concedes, in discussing his first theory, that it "appears to be an issue of first impression" (Pet. 19), and he refers to no case that addresses the second theory. Moreover, the court of appeals was correct in its determination of when petitioner's time began to run.

At bottom, the only basis for petitioner's claim that the court of appeals was incorrect is the argument that somehow petitioner's condition between the time the State's petition for a writ of certiorari was denied—the latest date chosen by the court of appeals to begin the running of petitioner's time—and the time the district court closed the habeas file on February 12, 1979, was such that he could not reasonably be required to bring his action during that time. Petitioner claims only that "until [February 12, 1979] there remained some threat of prosecution" (Pet. 31), and that petitioner "would face the risk of retaliatory reprosecution for having filed suit" (Pet. 32).

Even assuming these observations to be valid, neither creates an issue of constitutional dimension, nor supports the creation of federal tolling principles. In order for petitioner to prevail, these factors would have to present sufficient bases for abandoning this Court's rule that state tolling law must be applied to Section 1983 cases unless it is "inconsistent with the Constitution and laws of the United States." *Board of Regents* v. *Tomanio*, 446 U.S. at 485 (citation omitted). No such showing has been made. Indeed, in correctly recognizing that, "logic does not support" such a claim, the court of appeals pointed out (Pet. App. A16):

> The concerns prompting the tolling of a statute while one is in prison simply are not applicable when the party is free on bail. He is thereafter not denied

any access to counsel, nor is he hindered from investigating the facts concerning his claim or from starting suit on his own behalf.

There is accordingly no reason to believe that state law does not adequately protect any constitutional rights implicated here, by providing for tolling where appropriate to protect due process rights, or the right to counsel. Therefore, there exist no special federal concerns that argue in favor of replacing the state law with federal law.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

CHARLES FRIED
Solicitor General

RICHARD K. WILLARD
Assistant Attorney General

BARBARA L. HERWIG
Attorney

APRIL 1987

U.S. GOVERNMENT PRINTING OFFICE: 1987—181-483/40304